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*Attorneys for Defendant Embry-Riddle Aeronautical University, Inc.*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Audrey Davis, an individual,

**Plaintiff,**

V.

Rhondie Voorhees, as Dean of Embry-Riddle Aeronautical University, and Embry-Riddle Aeronautical University.

## Defendants

No. 3:21-cv-08249-DLR

**JOINT STATEMENT OF DISPUTE  
REGARDING REOPENING  
DISCOVERY**

Pursuant to the Court's Order [Doc. 134], the parties respectfully submit this Joint Statement of Dispute Regarding Reopening Discovery.

Pursuant to the Court's Order [Doc. 118], fact discovery closed on October 13, 2023. On October 12, 2023, after a hearing on the parties' discovery dispute regarding Plaintiff's production of documents regarding her settlement with Dr. Voorhees, the Court ordered Plaintiff to produce the requested documents, stating that the settlement between Plaintiff and Dr. Voorhees appears to be "collusive." [Docs. 126 and 130]. Plaintiff produced the documents at issue on October 18, 2023. Having reviewed the produced documents, Defendant Embry-Riddle Aeronautical University, Inc. ("ERAU") respectfully requests that the Court reopen discovery, to allow ERAU: (a) to depose: (i) Plaintiff; and (ii) Dr. Voorhees' counsel, Dan Warner, on the limited issues regarding Plaintiff's and Dr. Voorhees' settlement agreement; and (b) to depose Dr. Voorhees on the settlement agreement issues and on Plaintiff's claims against ERAU that pertain to and involve Dr. Voorhees in her former capacity as Dean of Students. ERAU further respectfully requests that the Court enter an order, pursuant to Fed. R. Civ. P. 30(d)(2), that: (c) Plaintiff pay ERAU's attorneys' fees and costs, and court reporter and videographer costs, associated with: (i) Plaintiff's former counsel, Jenny Foley's, deposition; and (ii) Plaintiff's deposition, if the Court allows; and (d) Dr. Voorhees pay ERAU's attorneys' fees and costs, and court reporter and videographer costs, associated with: (i) Dr. Voorhees' deposition, if the Court allows; and (ii) Dr. Voorhees' counsel Dan Warner's, deposition, if the Court allows.

1 Plaintiff, Ms. Foley, and Plaintiff's counsel do not object to the Court's reopening discovery  
 2 for ERAU to depose Ms. Foley. *See Doc. 131.*

### 3 I. ERAU'S POSITION

4 Plaintiff's counsel represented to the Court that, “[p]rior to and continuing after  
 5 Voorhees'[] August 9, 2023 deposition, [Plaintiff] and Voorhees were in discussions  
 6 regarding settlement of their claims against one another [but that ...] ***[t]hey did not enter***  
***into a settlement agreement until September 11, 2023...***” [Doc. 127 at 3 (emphasis  
 7 added)]. Plaintiff's counsel made similar representations to the Court during the discovery  
 8 dispute hearing on October 12, 2023.

9 Plaintiff's counsel's representations to the Court are inaccurate. Indeed, Plaintiff and  
 10 Voorhees entered into a fully executed and effective settlement agreement (or, as they  
 11 entitled it, a “common interest agreement”) on August 8, 2023 – *one day before Voorhees'*  
*August 9 deposition and unbeknownst to ERAU or its counsel.* Yet, when asked by ERAU's  
 12 counsel whether she settled with Plaintiff, Voorhees testified under oath, “No.” Further,  
 13 during Voorhees' deposition, it became readily apparent to ERAU's counsel that Voorhees,  
 her counsel, and Plaintiff's counsel had earlier colluded about the (sham) questions that  
 would be asked and the substance of Voorhees' responses to such (sham) questions. ERAU  
 wishes to depose Plaintiff, Voorhees, Mr. Warner, and Ms. Foley, as the documents  
 confirm, *just as the Court earlier suspected*, that there was a collusive settlement. ERAU  
 further seeks its fees and costs related to the depositions, if the Court so orders.

14 First, the language of the settlement agreement provides Voorhees with a reward for  
 15 helping Plaintiff. Second, the settlement agreement and emails produced between  
 16 Voorhees' counsel and Plaintiff's counsel evidenced that a settlement agreement had been  
 17 reached and signed by all parties *prior to Voorhees' August 9, 2023 deposition*. Plaintiff  
 18 and Voorhees re-signed their Common Interest Agreement, as of September 11, 2023,  
 19 despite having exchanged a fully executed Common Interest Agreement on August 8.  
 20 Notably, in Plaintiff's section of the parties' Joint Statement of Discovery Dispute [Doc.  
 21 127], and during the hearing on the same, Plaintiff's counsel represented that “[p]rior to and  
 22 continuing after Voorhees's August 9, 2023 deposition, [Plaintiff] and Voorhees were in  
 23 discussions regarding settlement of their claims against one another. They did not enter into  
 24 a settlement agreement until September 11, 2023...” [Doc. 127 at 3]. Plaintiff's counsel's  
 25 assertions are inaccurate.

26 Third, Ms. Foley sent an email to Mr. Warner on July 25, 2023 at 10:48 AM seeking  
 27 to bump out Voorhees' deposition – which was originally scheduled for July 27 – to get the  
 28 settlement agreement “fully ironed out.” Ms. Foley's email to Mr. Warner stated: “Please  
 ignore the draft I just sent you. An issue arose with how I phrased things with our co-  
 counsel...that I need to get ironed out. Would you be amenable to moving Dr. Voorhees  
 [sic] deposition a week or two so we can get this fully ironed out? I realize other counsel  
 will have to chime in on that, but I think that makes the most sense at this point.”). Ms.  
 Foley then told ERAU's counsel, in a July 25, 2:27 PM email (less than four hours after her  
 above-referenced email to Mr. Warner), that she needed to bump out the deposition because  
 of a different and personal reason, entirely unrelated to this case.

27 And, lastly, Plaintiff's counsel, Alex Shepard, stated in a comment to the draft  
 28 settlement agreement: “It's not really a Mary Carter agreement, so I think we're allowed to  
 keep this confidential, but **keep in mind that AZ courts have explicitly disapproved of**

1      secret Mary Carter agreements.” (emphasis added). Undeterred, Voorhees and Plaintiff  
 2      continued with their illicit scheme and settlement agreement.

3               Rule 30(d)(2), Fed. R. Civ. P. provides that, “[t]he court may impose an appropriate  
 4      sanction – including the reasonable expenses and attorney’s fees incurred by any party – on  
 5      a person who impedes, delays, or frustrates the fair examination of the deponent.” Plaintiff  
 6      and Voorhees – and their counsel – impeded and frustrated the fair examination of Voorhees  
 7      on August 9 when they entered into their collusive Common Interest Agreement prior to  
 8      Voorhees’ deposition. Further, neither Plaintiff, Voorhees, nor their counsel disclosed that  
 9      fact to ERAU, its counsel, or the Court; yet, they pretended as if they were still adverse  
 10     during the deposition.

11               The Arizona Supreme Court defines Mary Carter or, in Arizona, *Gallagher*  
 12     agreements as those “made between a plaintiff and one of several codefendants which deal  
 13     with how the agreeing defendant’s liability, if any, will be handled after the verdict is  
 14     rendered,” and broadly recognizes that “similar” agreements may fall under the *Gallagher*  
 15     umbrella. *See Mustang Equip., Inc. v. Welch*, 564 P.2d 895, 897–98 (1977); *City of Tucson*  
 16     v. *Gallagher*, 493 P.2d 1197 (Ariz. 1972). The Arizona Supreme Court has unequivocally  
 17     held that *Gallagher* and *Gallagher*-like agreements must be disclosed *immediately*. *See In re Alcorn*, 41 P.3d 600, 608 (2002), *as corrected* (Mar. 21, 2002) (emphasis added). Arizona  
 18     courts require disclosure for at least three reasons: (1) public policy compels disclosure, *see*  
 19     *Mustang*, 564 P.2d at 900; (2) “the disclosure of *Gallagher* agreements is or should be  
 20     required . . . to avoid the inherent tendency to work a fraud on the court and to avoid  
 21     ‘collusion’ between the plaintiff and some of the defendants[,]” *id.* at 899; and (3) when  
 22     undisclosed, *Gallagher* agreements sabotage the unaware party’s settlement strategy. *Id.* at  
 23     900. Had it not been for the overheard remarks during Voorhees’ deposition, *see* Doc. 127  
 24     at Ex. 1, and the Court’s Order compelling production [Docs. 126 and 130], Plaintiff and  
 25     Voorhees likely would have attempted to keep their Common Interest Agreement a secret  
 26     through trial and beyond. Significantly, Plaintiff and her counsel objected to the production  
 27     of the settlement-related documents at issue and fought hard to keep them a secret, to no  
 28     avail.<sup>1</sup>

19               Plaintiff, Voorhees, and their counsel impeded and frustrated the deposition process.  
 20     *See* Fed. R. Civ. P. 30(d)(2). Had ERAU known of their settlement agreement, it would  
 21     have, at a minimum, postponed Voorhees’ deposition, treated her as a hostile witness rather  
 22     than a co-defendant, and would have had the opportunity to examine her on matters relevant  
 23     to this case. ERAU did not have the opportunity.

## 24               II. PLAINTIFF’S POSITION

25               ERAU’s statement makes multiple factual and legal misrepresentations, and there is  
 26     no basis either for reopening discovery or shifting the costs of belated depositions to the  
 27     deponents.

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28     <sup>1</sup> As noted in ERAU’s portion of the Joint Statement of Discovery Dispute [Doc. 127], note  
 1, Plaintiff’s counsel, Ms. Foley, actually threatened sanctions if ERAU pursued further  
 2      discovery on the settlement communications and agreement between Plaintiff and  
 3      Voorhees. *See also* Doc. 127, Ex. 1 at ¶ 12.

First, while there was a signed settlement agreement the day before Voorhees's deposition, it was immediately apparent to counsel for Davis and Voorhees that further revisions were necessary and they continued negotiating the language of the settlement agreement, as evidenced by the fact that their final agreement was not signed until September 11, 2023. Declaration of Jenny L. Foley ("Foley Decl."), attached as **Davis Exhibit 1**, at ¶¶ 9-10. The claim that Davis and Voorhees had settled as of Voorhees's deposition is factually incorrect.

Second, ERAU claims that Attorney Foley lied about the reasons for moving Voorhees's deposition. This is also wrong, and Davis's counsel told ERAU's counsel this was wrong during their meet and confer call. Foley had a necessary medical procedure scheduled for October 2023 when Voorhees's deposition was initially scheduled for July 27. Foley Decl. at ¶ 6. However, this procedure was rescheduled to July, which made it so that Attorney Foley was no longer available for the deposition on July 27. *Id.* Davis thus rescheduled Voorhees's deposition for August 9, 2023, a date that Attorney Foley could make. *Id.* at ¶ 7. The specific rescheduled dates that Foley proposed were chosen in part because of a desire to revise some language in the settlement agreement, but the need to reschedule the deposition was due to Foley's medical issues. *Id.* at ¶ 8.

Third, there is nothing wrong the parties' agreement or conduct here. One of the first Arizona cases dealing with *Gallagher* agreements is *Damron v. Sledge*, 460 P.2d 997 (Ariz. 1969), a car accident personal injury case. At the start of trial, the plaintiffs notified the court and the insurer defendant for the first time that they had entered into a *Gallagher* agreement with the driver defendant, by which the plaintiffs agreed to pay the driver \$2,000 in attorneys' fees and not collect against him, and in return the driver assigned whatever claim he had against the insurers. *Id.* at 998-99. The driver's attorney also told the court that he intended to withdraw the driver's answer and allow a default in light of this agreement, but had not informed the plaintiffs of this. *Id.* at 1000. The Arizona Supreme Court found there was nothing improper or collusive about the agreement. *Id.* at 1001.

*City of Tucson v. Gallagher*, 493 P.2d 1197 (1972), was another car accident personal injury case. The Arizona Supreme Court approved of a settlement agreement by which the plaintiff would at any time be able to take judgment of \$10,000 against one of the defendants (the driver), and in return the plaintiff would not make any attempt to collect against that defendant if she obtained a judgment of \$10,000 or more against the other defendants (the City of Tucson). *Id.* at 1199. This agreement was not reduced to writing, but the parties informed the court of it before trial. *Id.* The City objected, arguing that this agreement deprived it of a fair trial because it removed all incentive from the driver to defend himself, and incentivized him to ensure that a large verdict was awarded against the City. *Id.* The court found that the agreement did not deprive anyone of a fair trial because the only change in the driver's motivation was that "he would be motivated in seeing that any judgment obtained by the plaintiff against the city would exceed \$10,000," which would still involve him trying to limit any finding of liability against him. *Id.* at 1199-1200.

*Hemet Dodge v. Gryder*, 534 P.2d 454 (Ariz. Ct. App. 1975), was yet another personal injury case, this time dealing with faulty vehicle repairs. The plaintiff and one of the defendants (a mechanic) entered into a verbal *Gallagher* agreement whereby if judgment was entered in favor of all defendants or against the mechanic only, the mechanic would pay \$50,000. However, if judgment was entered against the non-settling defendants, then any recovery from them would reduce the amount the mechanic would have to pay (eliminating his requirement to pay if the judgment was in excess of \$50,000). *Id.* at 460.

1 The terms of the agreement were set out in discovery responses before trial. *Id.* The court  
 2 found that, while there was authority in other jurisdictions disapproving of *Gallagher*  
 agreements, they were acceptable in Arizona. *Id.* at 460-61.

3 These cases show that, broadly speaking, *Gallagher* agreements are allowed in  
 4 Arizona, and they are permitted both for cases where a plaintiff agrees not to execute against  
 5 a settling defendant, or a settling defendant's liability will be offset by a judgment against  
 6 a non-settling defendant. There is nothing improper about the "reward," as ERAU calls it,  
 of Voorhees being potentially capable of recovering her attorneys' fees based on recovery  
 against ERAU.

7 ***Gallagher* agreements are only problematic when they are used to fool the court**  
**or the jury into believing parties are adverse.** *Mustang Equipment v. Welch*, 564 P.2d  
 8 895, 897-99 (Ariz. 1977), was another car accident personal injury case involving a  
 9 defendant employee driving a company car. The plaintiff sued the employee, his employer,  
 10 and the vehicle manufacturer. Shortly after the initial complaint was filed, the plaintiff and  
 11 the employer entered into a *Gallagher* agreement by which the plaintiff would only seek  
 12 execution of a judgment against the non-settling defendants, and afterward the employer  
 13 filed a cross-claim against the manufacturer. *Id.* at 896-97. The settling parties agreed to  
 14 keep the agreement a secret from the manufacturer and did not disclose its existence to  
 15 anyone else until **after trial**. *Id.* at 897. When the plaintiff attempted to collect against the  
 16 manufacturer and revealed the existence of the agreement, the manufacturer filed a motion  
 17 for relief from the judgment. The plaintiff then sought to execute against the employer, who  
 18 in turn filed a motion for relief from the judgment. *Id.* at 897.

19 The court found the agreement "**did not encourage fraud or collusion**" or harm the  
 20 integrity of the trial, but did invalidate the agreement because it was kept secret. The court  
 21 found that it was necessary to disclose the existence of the agreement before trial because,  
 22 "[h]ad [Manufacturer's] counsel known that the plaintiff would execute solely upon his  
 23 client and for the entire amount of the judgment, he may indeed have been more amenable  
 24 to settlement prior to trial." *Id.* at 900. The court also found that pre-trial disclosure was  
 25 necessary as a matter of public policy, stating: "we cannot condone secret agreements  
 26 between a plaintiff and a defendant which, by their very secretiveness, may tend to  
 27 encourage wrongdoing and which, at the least, may tend to lessen the public's confidence  
 28 in our adversary system." *Id.*

29 *In re Alcorn*, 41 P.3d 600 (Ariz. 2002), was a medical malpractice case by a man  
 30 against a doctor and his employer hospital. The doctor's insurer was insolvent and, due to  
 31 financial difficulties, the doctor instructed his attorneys to do as little work as possible. *Id.*  
 32 at 602-03. The hospital was dismissed from the case at summary judgment, leaving the  
 33 doctor as the only remaining defendant for trial. *Id.* at 603. "Not long" before trial, the  
 34 plaintiff and the doctor entered into a *Gallagher* agreement, in which (1) the plaintiff agreed  
 35 not to execute against the doctor, (2) the doctor's attorneys would not object to the scope or  
 36 form of any inquiry by the plaintiff's counsel during trial, (3) the agreement would be kept  
 37 secret, and (4) the plaintiff agreed to dismiss all claims against the doctor after trial. *Id.* at  
 38 603. Trial went forward, with essentially no objections by the doctor's counsel to the  
 39 plaintiff's case, and the parties stipulated to dismissal after trial was completed. *Id.* at 604.  
 40 The Arizona Supreme Court was furious at the parties, stating "[w]e hold today, as strongly  
 41 as possible, that any agreement that has the *potential* of affecting the manner in which a  
 42 case is tried is one that may encourage wrongdoing and must therefore be disclosed to the  
 43 court." *Id.* at 604.

1 trial judge and all litigants in the case," noting in particular the agreement not to make  
 2 objections to testimony *at trial*. *Id.* at 608-09.

3 ERAU takes the position that all *Gallagher* agreements must be disclosed  
 4 **immediately** in all circumstances, but it provides no support for this proposition. The court  
 5 in *Mustang* stated that it is "the better policy to require candid disclosure of all Gallagher-  
 6 type agreements to the court and to all parties concerned *before trial* or, if entered into  
 7 during the course of the trial, at the earliest possible opportunity." 564 P.2d at 900.  
 Accordingly, the rule in *Mustang* is not that *Gallagher* agreements entered into prior to trial  
 must be disclosed immediately, but rather that they must be disclosed **before trial**. That is  
 what occurred here. There is nothing to suggest that a party's conduct during discovery  
 implicates any of the above concerns with *Gallagher* agreements.

8 There was nothing improper about the settlement agreement here. It was simply two  
 9 parties that were initially adverse later choosing to settle with each other. Once their final  
 10 agreement was signed by all parties, they quickly notified the Court and ERAU that they  
 were no longer adverse. To claim that this conduct is in the same ballpark as *Mustang* or  
*Alcorn* is absurd.

11 Because there was nothing improper about this settlement agreement, there is no  
 12 relevance to any of the requested testimony ERAU plans to elicit. ERAU also fails to  
 13 explain why it did not attempt to take these depositions before fact discovery closed. ERAU  
 14 knew as of August 9 that there was an agreement between Davis and Voorhees, and there  
 15 is no explanation for ERAU's lack of diligence on this issue. There is also no legal basis  
 for requiring anyone other than ERAU to pay for these depositions, the university should  
 not be rewarded for its lack of diligence by allowing fee-shifting for depositions it should  
 have taken during discovery.

### 16 III. DR. VOORHEES' POSITION

17 Dr. Voorhees is no longer a party to this lawsuit and is specially appearing for the  
 18 limited purpose of providing her position; Dr. Voorhees waives no rights by making this  
 19 limited appearance. First, regarding the settlement agreement, per §§ 1 and 2, the stipulation  
 20 and proposed order were required to be filed with the Court within 5 days of the effective  
 21 date but were not. The parties were thinking about revising some of the language. This is  
 why there were several email exchanges after Dr. Voorhees's deposition, and it took a while  
 for the stipulation and order to be filed with the Court. Despite any technical arguments that  
 can be made to the contrary, the actions of the parties demonstrate that the settlement  
 agreement was not finalized until after Dr. Voorhees's deposition.

22 Also, ERAU's allegation that the agreement provides Dr. Voorhees with a reward  
 23 for helping Plaintiff is incorrect. The agreement provides for the remote possibility that,  
 24 after all of Plaintiff's attorney's fees are paid, Dr. Voorhees *may* be reimbursed 40% of the  
 25 attorneys' fees that she incurred. Most significantly, § 14 states that each party is free to  
 26 withdraw from the agreement at any time, and the only part of the agreement to remain  
 intact would be the mutual dismissal with prejudice. As such, the Plaintiff can bow out of  
 27 this agreement at any time without paying anything to Dr. Voorhees. Nothing about the  
 agreement impacted how Dr. Voorhees testified at her deposition, as she is willing to affirm  
 by declaration, under penalty of perjury.

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1           Second, ERAU's claim of being surprised by Dr. Voorhees's hostility is  
 2 disingenuous at best. While the Dean of Students at ERAU Dr. Voorhees was not  
 3 responsible for Title IX but attempted to help smooth over an issue with Plaintiff created  
 4 by ERAU's widely known shortcomings with Title IX. As a result, Dr. Voorhees was  
 5 unfairly attacked online by Ms. Davis. While ERAU was encouraging of Dr. Voorhees in  
 6 filing a defamation lawsuit, it provided no other support. Then, when Dr. Voorhees was  
 7 named in this lawsuit, including in her professional capacity as its Dean of Students, ERAU  
 8 refused to support her in any way or cover any of the fees associated with the Title IX claim  
 9 brought against her. As ERAU was made well aware, those mounting legal fees that Dr.  
 10 Voorhees was forced to pay personally while Dr. Voorhees was an employee at ERAU,  
 11 over a lengthy period of time, created extreme and increasingly burdensome financial and  
 12 emotional stress for her. Additionally, throughout her tenure at ERAU, multiple employees  
 13 and students raised concerns about Title IX at the Prescott Campus with Dr. Voorhees, and  
 14 the head of Title IX (Charlie Sevastos) would get defensive and upset with Dr. Voorhees  
 15 and others when such issues were brought to his attention. On one occasion, an  
 16 administrator resigned and reported to Dr. Voorhees that she was tired of listening to women  
 17 students on this campus who have been raped, and the University doing nothing. Mr.  
 18 Sevastos became increasingly hostile with Dr. Voorhees as she continued to report these  
 19 issues, including at one point humiliating her by ordering a uniformed safety officer to her  
 20 office to solicit a "statement" from her about the statement of that administrator. Also,  
 21 despite Dr. Voorhees complaining to HR repeatedly and pleading for help and support,  
 22 ERAU allowed the Title IX Coordinator, Liz Frost, and other employees to severely bully  
 23 and harass Dr. Voorhees repeatedly.

24           In May of 2023, ERAU suddenly terminated Dr. Voorhees and used the ongoing  
 25 bullying and harassment by Dr. Frost and others as pretext for this ultimate act of retaliation.  
 26 This termination was unexpected, without proper notice or protocols, provided without an  
 27 official reason, and devastating to Dr. Voorhees, both professionally and financially. Prior  
 28 to her termination, Dr. Voorhees had received glowing performance evaluations from her  
 supervisor. Therefore, because of ERAU's own actions, Dr. Voorhees's separation from  
 ERAU was not amicable. Immediately after her termination and months before her  
 deposition, ERAU attempted to have Dr. Voorhees enter into a separation agreement with  
 a gag provision in it, and she refused. ERAU was on notice for several months that its  
 relationship with Dr. Voorhees was not good. ERAU was well aware that Dr. Voorhees  
 would not be anything less than hostile at her deposition. Moreover, ERAU was aware that  
 Dr. Voorhees knew about numerous documents that were relevant to Title IX, and that  
 ERAU failed to produce them in discovery; it should not have come as a surprise that these  
 documents and issues would be discussed in Dr. Voorhees's deposition. The settlement  
 agreement changes nothing.

29           Third, re-deposing Dr. Voorhees is unnecessary and will not change anything.  
 30 Regardless of the agreement, Dr. Voorhees's testimony would have been the same. Dr.  
 31 Voorhees offered to provide ERAU with a declaration and it refused. Furthermore, deposing  
 32 counsel is extreme and unnecessary. However, given that Ms. Foley has volunteered, there  
 33 should be no need to depose Dr. Voorhees or her counsel. Dr. Voorhees has been dealing  
 34 with this litigation for many years; it has taken a huge financial toll on her, and she needs  
 35 to work on starting her life over at this point. ERAU should not be permitted to use the legal  
 36 system to retaliate against Dr. Voorhees for testifying truthfully. Dr. Voorhees is no longer  
 37 a party and should not be involved in this case any further.

## **GOOD FAITH CONSULTATION CERTIFICATE**

On November 8, 2023, counsel for Plaintiff and counsel for ERAU met and conferred on these issues and were unable to come to an agreement regarding Plaintiff's deposition; or regarding the allocation of costs and fees associated with the additional depositions.

On November 10, 2023, counsel for Dr. Voorhees and counsel for ERAU met and conferred on these issues and were unable to come to an agreement regarding Mr. Warner's deposition or Dr. Voorhees' deposition. Mr. Warner objected to each of ERAU's requests and proposed that ERAU provide Mr. Warner with a declaration for Dr. Voorhees to sign, in lieu of her deposition. ERAU declined the offer.

DATED this 6th day of December, 2023.

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